UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

| | | |
|---|---|---|
| IN RE PORK ANTITRUST LITIGATION | ) | File No. 18-cv-1776 (JRT/JFD) |
| This document relates to: | ) | |
| Sysco Corp. v. Agri Stats, Inc., et al. Case No. 21-cv-1374(D. Minn.) | ) | St. Paul, Minnesota August 21, 2023 10:00 a.m. |
| IN RE CATTLE AND BEEF ANTITRUST LITIGATION | ) | File No. 22-md-3031 (JRT/JFD) |

BEFORE THE HONORABLE JOHN F. DOCHERTY
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE

**(MOTION HEARING)**

Proceedings recorded by mechanical stenography; transcript produced by computer.

APPEARANCES

**For Carina Ventures, LLC:**

Kellogg, Hansen, Todd, Figel & Frederick, P.L.L.C.
DEREK HO, ESQ.
DUSTIN GRABER, ESQ.
1615 M Street NW
Suite 400
Washington, DC 20036

Boies Schiller Flexner LLP
SCOTT E. GANT, ESQ.
1401 New York Avenue NW
Washington, DC 20005

**For Sysco Corporation:**

Baker Botts L.L.P.
JULIE B. RUBENSTEIN, ESQ.
700 K Street NW
Washington, DC 20001

**For Direct Purchaser Plaintiffs:**

Hausfeld LLP
KYLE G. BATES, ESQ.
888 16th Street NW
Suite 300
Washington, DC 2006

**For the Consumer Indirect Purchaser Plaintiffs:**

Lockridge Grindal Nauen PLLP
ROBERT DAVID HAHN, ESQ.
100 Washington Avenue South
Suite 2200
Minneapolis, Minnesota 55401

**For the Commercial and Institutional Indirect Purchaser Plaintiffs:**

Cuneo, Gilbert & LaDuca, LLP
ALEC BLAINE FINLEY, ESQ.
Suite 200
4725 Wisconsin Avenue NW
Washington, DC 20016

**For Defendants Cargill Meat Solutions Corporation and Cargill, Inc.:**

Wilkinson Stekloff LLP
KOSTA STOJILKOVIC, ESQ.
2001 M Street NW, 10th Floor
Washington, DC 20036

Greene Espel PLLP
X. KEVIN ZHAO, ESQ.
222 South Ninth Street
Suite 2200
Minneapolis, Minnesota 55402

**For Defendant JBS USA Food Company:**

Spencer Fane LLP
DONALD HEEMAN, ESQ.
100 South Fifth Street
Suite 2500
Minneapolis, Minnesota 55402

Quinn Emanuel Urquhart & Sullivan LLP
SAMI H. RASHID, ESQ.
51 Madison Avenue
New York, New York 10010

**For Defendant Tyson Foods:**

Perkins Coie
SUSAN E. FOSTER, ESQ.
1201 Third Avenue
Suite 4900
Seattle, Washington 98101

Axinn Veltrop & Harkrider, LLP
LINDSEY STRANG ABERG, ESQ.
1901 L Street NW
Washington, DC 20036

**For National Beef Packing Company, LLC:**

Jones Day
BENJAMIN L. ELLISON, ESQ.
90 South Seventh Street
Suite 4950
Minneapolis, Minnesota 55402

**For Hormel Foods Corporation:**

Faegre Drinker Biddle & Reath LLP
CRAIG S. COLEMAN, ESQ.
EMILY ELIZABETH CHOW, ESQ.
90 South Seventh Street
Minneapolis, Minnesota 55402

**For Seaboard Foods LLC:**

Stinson Leonard Street LLP
PETER J. SCHWINGLER, ESQ.
50 South Sixth Street
Suite 2600
Minneapolis, Minnesota 55402

**For Smithfield Foods, Inc.**

Larkin Hoffman Daly & Lindgren Ltd.
JOHN A. KVINGE, ESQ.
8300 Norman Center Drive
Suite 1000
Minneapolis, Minnesota 55437

**For Clemens Food Group, LLC:**

Greene Espel PLLP
DAVIDA S. WILLIAMS, ESQ.
222 South Ninth Street
Suite 2200
Minneapolis, Minnesota 55402

**For Triumph Foods, LLC:**

Husch Blackwell LLP
CHRISTOPHER SMITH, ESQ.
8001 Forsyth Boulevard
Suite 1500
St. Louis, Missouri 63105

**Court Reporter:**

ERIN D. DROST, RMR-CRR
Suite 146
316 North Robert Street
St. Paul, Minnesota 55101

**P R O C E E D I N G S**

**IN OPEN COURT**

THE COURT: Good morning, everyone. Please be seated.

All right. We're here this morning for a hearing on a motion brought by Sysco and a non-party named Carina for substitution in two cases; the In Re Pork Multidistrict Litigation and the In Re Cattle and Beef Multidistrict Litigation.

I understand that appearances got taken before I came in and so we won't be redoing that.

I also understand that counsel on both sides have prepared presentation PowerPoints. My thought would be to have the moving party do their presentation, I'd ask any questions I have, and then we'd move to the defendants for their presentation and any questions I've got for them. If that sounds all right to the parties -- if it doesn't, let me know, and we can modify things if needed. But if that sounds all right to the parties, then I'd ask counsel for Sysco and Carina to come to the lectern and get us started.

MR. GANT: Good morning, Your Honor. That procedure is acceptable for the movants.

THE COURT: Okay. Can you get the microphone a little closer, please? I'm sorry.

MR. GANT: Yes. Yes.

THE COURT: Yeah. Thanks. And there are buttons also on the lectern that move it up and down if that's at all helpful to you.

MR. GANT: Thank you, Your Honor.

THE COURT: Okay. All right. I know that we had appearances, but I wasn't here for them, so would you please identify yourself. Thank you.

MR. GANT: I will. Scott Gant from Boies Schiller Flexner for Carina. I'd like to introduce my colleagues Derek Ho from --

THE COURT: Good morning.

MR. GANT: -- the Kellogg Hansen firm. He'll be speaking in a moment. I'll turn to that.

Next to him is Kelly Daley who is from Burford Capital. She's a managing director of Burford Capital, and she's the secretary of Carina Ventures, one of the movants here, Your Honor.

THE COURT: Okay.

MR. GANT: And with your permission, what we propose to do is to have Mr. Ho start off for some background and context, Your Honor. Mr. Ho and his firm represented Burford and Carina in connection with the arbitration proceedings in which Sysco and Buford subsidiaries were involved, and then in the resolution and

settlement of that. And he's intimately familiar with many of the cases and the background. I have a longer tenure, as you may know, in these cases, so there may be some issues about which it's more appropriate for me to address. But with your permission, I'd like to turn it over to Mr. Ho.

THE COURT: That's fine. And, again, I have read everything that was submitted in this case -- or in connection with this motion, excuse me. I have a number of questions, but, again, since you've got a -- you know, a presentation teed up, I intend to let that run to completion, assuming it's not, you know, terribly long, before I -- before I start interrupting with questions.

MR. GANT: We're all here for you to answer questions, including Ms. Daley. We brought her here to ensure that if you had any questions that were more appropriately addressed to Burford or Carina, that she's here to answer those as well.

THE COURT: Okay. Thank you.

Mr. Ho, you're up.

MR. GANT: I'll turn it over to Mr. Ho.

MR. HO: Good morning, Your Honor. Derek Ho from Kellogg Hansen on behalf of Carina Ventures. I'm hoping not to mess with the technology today, so I have hard copies of the PowerPoint deck. With the Court's permission, may I hand those up?

THE COURT: Yes. Of course. I think I've got one, so --

MR. HO: Oh, you do?

THE COURT: Yes.

MR. HO: My apologies. Great.

Perfect. Thank you, Your Honor, and may it please the Court.

After a protracted and expensive arbitration and extensive settlement negotiations, Sysco and Burford have voluntarily settled their dispute by Sysco assigning all right, title, and interest in the Sherman Act claims in both of these MDLs to Carina, which is a Burford subsidiary.

There's no secret about the reason for the assignment because much of the record of the parties' arbitration is now in the public docket. And the undisputed facts make clear that the assignment is valid, not only under federal law, which governs the assignability of federal antitrust claims, but also because of the strong federal policy favoring settlement of disputes.

Given that valid assignment, substitution is appropriate under Rule 25(c) because Carina is the only party that now has the right to prosecute these claims. And substitution will not prejudice defendants' substantive rights.

If Your Honor turns to the second slide, the first

one after the cover page, our motion rests on two legal points. The first is that the assignment is valid as a matter of federal law, under which, federal antitrust claims are freely assignable. Defendants' argument under state champerty law is wrong because states can't restrict the assignability of federal claims. And even if they could, Illinois, New York, Delaware do not prohibit this assignment.

The second point is that substitution will facilitate the conduct of the litigation, the standard set forth in *Jalin Realty*, because Sysco no longer has any substantive right to prosecute this case. Carina is the real party in interest. And that is why substitution is routine and why refusal to substitute has been reversed by the Eighth Circuit in cases of complete assignment.

So before I get into the details of those two points, I did want to just talk a little bit about the language of Rule 25(c), which is on Slide 3 of the deck. Rule 25(c) provides that if there is a transfer of interest, the action may be continued by the original party unless the Court grants either substitution or joinder upon motion.

So if there is neither substitution nor joinder, then the original party, Sysco, may continue the action. And that speaks to the purpose of Rule 25(c), which we set out on the next slide, which is to allow this action to

continue unabated when the interest in the lawsuit changes hands without requiring the initiation of an entirely new lawsuit. So the emphasis of Rule 25(c) is on what will facilitate the continuation of this lawsuit.

And then the second purpose set out in the slide is to ensure that the litigation be conducted by the real party in interest. So when *Jalin Realty* says that the test is what will facilitate the conduct of the litigation, what that really means is what will allow the real party in interest, now that the interest has been transferred, to continue this litigation unabated without the need to file a new lawsuit. So that's the overarching purpose of Rule 25(c).

You're going to hear a lot about other things that sound like they relate to the facilitation of the conduct of the litigation, but when the Court uses the phrase "facilitate the conduct of the litigation," it is alluding to the purposes of Rule 25(c), and that is the continuation of the lawsuit by the real party in interest.

And so here when you think about what choice would facilitate the conduct of the litigation in that relevant sense, as between the three choices that Rule 25(c) offers, the original party continuing, substitution, or joinder, substitution is the only choice that actually facilitates the conduct of the litigation in the sense of allowing the

real party in interest to continue this litigation unabated without the need to file a new lawsuit, because Sysco no longer has an interest in this claim. It cannot prosecute this claim under the assignment. It's not the real party in interest under Rule 17. Only Carina is the real party in interest. Only Carina has the power under the assignment to prosecute the claims. And that's why under Rule 25, the only choice that actually achieves the purposes of the rule and the test set out in the cases is substitution.

So let me show that by first looking at -- or pointing the Court to the relevant provisions of the assignment. That's on Slide 5. I don't think there's any dispute about this. It's attached as Exhibit A to the joint motion. And the relevant provisions are Sections 2 and 4 of the Assignment Agreement, but let me just walk through it.

So in Section 2, Sysco, the assignor, unconditionally sells, assigns, and transfers to Carina, the assignee, all of assignor's right, title, and interest in the transferred assets. It is a complete assignment. The word "all" is very clear.

And then paragraph 4, Section 4 of the agreement clarifies what is already made clear in Section 2, which is, that the assignee possesses all rights to prosecute, enforce, and collect the claims and to exercise and enjoy the benefit of the other transferred assets, to the

exclusion of the assignor, which shall retain no rights to do so.

So, again, under the Assignment Agreement, Sysco has no right to prosecute these claims. Carina has the full right, title, and interest in these claims.

And the next slide just makes clear that when the agreement speaks of transferred assets, that includes, specifically, the rights associated with these two litigations as defined in paragraph (a)(ii) and (a)(iii) of the definition of transferred assets.

THE COURT: I promised no questions -- I promised no questions, but --

MR. HO: I will --

THE COURT: -- a quick one at this point. Is the list on Slide 6 all of the interests that are being transferred, or are there other cases as well as those three?

MR. HO: There is *Turkey* as well, so because there wasn't a ton of room on the slide --

THE COURT: I wondered, yeah.

MR. HO: -- it does go on.

THE COURT: Okay.

MR. HO: And if you look at Docket 1940 at page 8, you'll be able to see the entire provision.

THE COURT: Okay.

MR. HO: The next point and really the major premise of our argument is on Slide 7, which is that federal antitrust claims are freely assignable. And there is case law in the Circuit Courts that goes back more than a century, literally to two years after the enactment of the Clayton Act in 1914, that makes clear that federal antitrust claims are freely assignable.

They are on the slide here. I won't go through them all. But it starts with the *United Copper Securities* case looking to the general common law of the United States and saying, federal antitrust claims -- and that was a federal antitrust case -- are assignable. And you can see the litany of cases sort of culminating in the *Gulfstream* case, which recognized, after an extensive analysis, that that is the federal rule relating to antitrust claims.

And there's an important reason for that rule, which we set out in the next slide, which is that private litigation is critical to the enforcement of the antitrust laws. The Supreme Court has recognized that time and time again.

We recite the language from the *Perma Mufflers* case, which we cited in our brief as well, about how private actions are a vital means for enforcing the antitrust policy of the United States.

I could have added a lot more cases, but I'll also

mention the *Illinois Brick* case, which, of course, is not the origin of the direct purchaser rule, but which confirmed the direct purchaser rule.

And one of the three important policy reasons that the Court gave for the direct purchaser rule is that it concentrates the right of action in a single direct purchaser. And why did the Court decide that that was the right way to interpret the Sherman Act and the Clayton Act? It did that because it said that will facilitate private litigation. It will incentivize the direct purchaser, which now will have a much larger and concentrated claim, to bring those claims.

Why is that important? Because, again, the Supreme Court has always recognized that private enforcement of the antitrust laws is critical to its deterrent function and to the proper functioning of our markets.

*Illinois Brick* also said another thing which is important here. It said, the one reservation we have about concentrating all this power in the direct purchasers is that the direct purchasers may have relationships with its -- with their suppliers, and that might deter the direct purchaser from bringing suit. Nonetheless, it said, it's better to concentrate the power to bring private lawsuits in the direct purchaser rather than have that essentially fragmented among all of the indirect purchasers.

But the Court was commenting about that potential deterrent effect of the supplier-distributor or supplier-customer relationship not because that was a good thing, but because it viewed that as a potential problem for the enforcement of the antitrust laws. And that's going to be important, because what we have here is an assignment by a direct purchaser that has felt that commercial impediment to bringing its antitrust claims.

These defendants have put commercial pressure on Sysco to refrain, frankly, from litigating these claims zealously. And so it is -- it advances the purposes of the antitrust laws as articulated by *Illinois Brick* itself for Sysco to be able to say, Okay, well, if we are impeded from pursuing these claims zealously because we need beef and pork from these suppliers, we can, instead, assign these claims to a third party that isn't impeded by this supply relationship. And that assignee, in this case Carina, can do exactly what the antitrust laws want to have done in this case, which is to have these claims zealously prosecuted so that price-fixing and other constraints, unlawful restraints on markets don't go unremedied.

And that's exactly what the *Wallach* case recognized in the Third Circuit, which is the next case on the slide. That impeding the assignability of federal claims impedes the purposes of the federal antitrust laws

because it prevents valid claims from being zealously enforced.

So against that backdrop -- and now I'm turning to the next slide, Slide 9 -- state law has no power to restrict the assignability of federal claims. Two basic reasons: One is the Supremacy Clause. This is a federal cause of action created by Congress. Congress has the right to decide whether these claims are freely assignable, and federal common law, as I noted, dating back almost to the time of the enactment of the Clayton Act, says that federal causes of action are freely assignable unless Congress says otherwise. So under the Supremacy Clause, states simply don't have the constitutional authority to restrict the free assignability of claims.

And the second related reason is that if states did have the power to restrict the free assignability of claims, it would lead to an untenable result, which is that you would have 50 different state law regimes for the assignability of claims that are inconsistent. These cases before Your Honor are MDLs, and MDLs highlight the reason why that is not a tenable regime. You have cases that have been transferred here from other courts, cases that may have been directly filed here. That already creates complicated choice of law problems in other contexts. But those complicated choice of law problems cannot exist with respect

to the assignability of federal claims. As the Courts have recognized, there has to be a uniform federal rule regarding the assignability of claims.

The *Carlson* against *Green* case, which we cite in the slide, is about survivability, not assignability, but the two are deeply-related contexts and concepts. And the Supreme Court said very clearly that with respect to survivability, because this was a *Bivens* action, because it's a federal cause of action, federal law applies, and there has to be a uniform federal rule of survivorship under federal law. And same with the other two cases that we put on the slide. There are more cases that we cite at Notes Two and Three of our reply brief that are to the same effect.

With respect to the next slide, the Supreme Court's decision in the *Sprint* case from 2008 confirms that federal claims are freely assignable. That's not just my reading of *Sprint*. That's the reading of the Federal Circuit in the *Mojave Desert* case. It's the reading of the Second Circuit in the *John Wiley* case; that federal causes of action are freely assignable unless Congress says otherwise. It's also what the Supreme Court said as far back as 1920 in the *Spiller* against *Atchison case*.

And I'll add one more case because it's from this circuit. In 1965, the Eighth Circuit -- and we cite this

case in our brief at Footnote 3 -- in the *Western Auto Supply* case, adopted *Spiller* and said exactly what *Spiller* said, which is, if you have a federal cause of action, it -- the assignability of that cause of action is governed by federal law. And unless Congress has said it's not assignable, it is. And it applied that general rule to claims brought by an assignee under Section 16(b) of the 1934 Act -- the 1934 Securities Act, and it said, because the 1934 Act doesn't say that claims are not assignable, they are.

And that same conclusion would apply to the antitrust laws. There is nothing in the Sherman Act or the Clayton Act that says they are not assignable. To the contrary, all of the policy reasons that I alluded to before indicate that they are.

Slide 11 is our fallback position, which is that state law -- state champerty law doesn't prohibit this assignment in any event. I won't go through all of the reasons because for all the reasons that I have just given, we think that the correct answer here is that federal law applies, but all roads basically lead to Rome. Even if you were to say state law applies, if you apply the law of Illinois, which is the law that governs this contract, there can be no -- the assignment is valid because defendants don't have standing to raise champerty in Illinois. And, at

any rate, there is no champerty. Minnesota has abolished champerty altogether. And in Delaware, which we don't think applies, there also is no champerty for the reasons that we give in our brief.

Slide 12 just lays out the very clear law in Illinois dating back more than a century now that says that the defendants here have no standing in Illinois to raise champerty. You know, again, we could have put more quotations on our slide, but for purposes of space, we kept it at those three.

Slide 13, even if defendants could raise champerty, champerty doesn't apply because fundamentally champerty is about a third party officiously intermeddling in someone else's litigation. And as I said at the outset of this presentation, there was not officious intermeddling by Carina. This was a voluntary settlement agreement arising out of hotly contentious arbitration. And where parties voluntarily settle their claims, there's a policy that favors the enforcement of that dispute. There's no policy that says that that is some kind of officious intermeddling.

So for all those reasons, we think that the first point that the Court ought to decide is that the assignment here is, in fact, valid.

And that then leads us to our second point, which

is that because the assignment is valid, the only real choice, as I alluded to at the outset, under Rule 25(c) is for Carina to be substituted for Sysco because only Carina has the ability and the right to prosecute these claims going forward.

If I could ask Your Honor to turn to Slide 16, I want to spend a little bit of time just talking about the case law in this district and in this circuit that we think guides the way.

So there are four cases that you see. *Jalin Realty* sets out, as Your Honor knows, the basic standard. And it was a case involving an assignment of a claim much like in this case as part of a settlement between an insured and an insurer. In that settlement, the insured said, Okay, we'll settle this policy dispute, coverage dispute, and as part of that, we'll assign our claim to attorneys fees to Hartford, the insurer.

And the question was whether the insurer could be substituted. And the answer was, yes. And the simple reason -- this is not -- shouldn't be complicated because the reason is simple. The simple reason is that the insurer, much like in this case, had a complete assignment of the claim and was, therefore, the real party in interest. And the assignor was no longer the real party in interest and had no further right to prosecute the claim. And that's

what the Magistrate Judge said in their Report and Recommendation, and that's what Judge Tunheim adopted. And so we think that *Jalin Realty* is really the blueprint for what this Court ought to do in this case.

Similarly, I'm not sure if I'm pronouncing this correctly, but the Couf case, C-o-u-f, same thing; an assignment from an assignor to an assignee, and the substitution was granted on the ground that the assignee had become the real party in interest, the assignor was no longer the real party in interest, and it was really as simple as that.

*Columbian Bank* affirmed a grant of substitution in much the same posture. The Columbian Bank was taken over by the FDIC, and then the receiver assigned the bank's interest in a judgment to a third party. The District Court granted substitution. No fuss. And the Eighth Circuit affirmed. There was no evidentiary hearing. There was no discovery. The simple point was that the assignee had become the real party in interest, and under Rule 25, that's the whole point, to let the action continue unabated in the name of the real party in interest.

And then lastly, the *ELCA* case, that involved a transfer of property from one company to a newly created company, ELCA Properties. And that -- in that case, the District Court didn't let the original party proceed, and

then it denied substitution to the assignee. And the Eighth Circuit said that that was an abuse of discretion, and it not only reversed but remanded with an order to allow substitution. Why? Because the assignee, the transferee, was now the real party in interest. It had all the rights related to the property and so was the proper party in this litigation.

Again, you're going to hear a lot of arguments from the other side about discovery concerns, about admissibility, about things that relate to matters that are simply outside of the core scope of Rule 25, not only as evidenced by the purposes that I articulated earlier, but as evidenced by these cases. Because what you don't see in these cases is discussion of whether there have been commitments about whether the assignee is, you know, financially stable or judgment proof or is in the same financial condition as the assignor. You don't see anything in these cases about the assignor committing to, you know, be a party for purposes of discovery.

We have gone farther in trying to reassure the defendants that they are not going to suffer any prejudice from this assignment than what any of these cases actually demands. What these cases stand for is the straightforward proposition that where there has been a complete assignment and the real party in interest has switched from the

assignor to the assignee, substitution is the appropriate remedy.

If we go to the next slide, I think it's helpful to look at the question from the other direction, which is, what happens if substitution is denied? Sysco, under Rule 25, would be entitled to continue the litigation. But as we've seen from the language of the assignment, Sysco has no right to prosecute these claims. Under the agreement, Sysco is legally powerless to continue as the plaintiff in this case. And so if Sysco remains the plaintiff and Carina is not substituted in, you have an untenable situation where the party before the Court is not actually the party that's empowered to litigate these claims.

And it's sort of ironic that this is what the defendants want because the defendants are almost always, in my experience, you know, criticizing litigation funding because they feel like the litigation funder is in the shadows as opposed to before the Court. Here, Carina doesn't seek to be a litigation funder. Carina is seeking to be the party before the Court. And now the defendants, ironically again, want Sysco to be the party before the Court even though it doesn't control the litigation, and for Carina to be precluded from participating in this litigation even though it is the real party in interest.

I think another way to look at this is what would

have happened had this assignment occurred before this litigation was commenced? This has occurred in a lot of other cases that I understand to be before the Court. If Sysco had assigned these cases the day before Carina brought suit, there would be no doubt that Carina would be the proper plaintiff. And there would also be no doubt that Sysco would not need to be joined as a co-plaintiff in order for Carina to proceed as the assignee.

All that has happened here is that that assignment occurred in the middle of the litigation, and so technically speaking, Rule 25, rather than Rule 17, applies. But it doesn't change the fundamental point that when you have an assignment from an assignor to an assignee, the assignee has the power and the privilege to pursue that litigation without the need for the assignor to be involved, otherwise, in all the cases in which there has been an assignment, you would have to start asking questions about whether the assignor needs to be joined as a party for discovery purposes or for some other purpose. That's just not how it works in practice, and nothing in Rule 25 compels a different result just because this has occurred in the course of litigation.

So I want to end with this point about prejudice, because I think you're going to hear a lot from the other side about prejudice. And I'd ask again the Court to focus

on what Rule 25 is about and view the question of prejudice through that lens. Rule 25 is fundamentally about substituting an assignee for an assignor, which, by operation of law, means that Carina is going to stand in the shoes of Sysco. And so when we hear -- when the cases talk about prejudicing defendants' substantive rights, what the cases are focusing on is the fact that when there is a transfer of interest that triggers Rule 25, the assignee stands in the shoes of the assignor; and by operation of that principle, there is no change to the substantive rights of the defendant.

That's best articulated, I would say, by the *ELCA* case in Footnote 5, which we cite in the slide, which says, As the new property owner -- here we've just plugged in Carina for the parties in the ELCA -- Carina seeks the same relief and assumes an identical position to Sysco in the lawsuit. The defendants are free to assert the same defenses against Carina that it would have asserted against Sysco. That means there is no prejudice to defendants' substantive rights.

Now on top of that, as I say, we have tried to provide additional reassurances to the defendants that Sysco will remain amenable to party discovery, and that we will, you know, try to -- we've tried to address in many ways all of the other concerns that they have about the practical

implications of this assignment, but as the cases that I alluded to before indicate, those are not the core question of prejudice under Rule 25. The core question of prejudice is answered by the fact that an assignee, like Carina, stands in the shoes of the assignor, and the claims and defenses against Carina will be no different. Otherwise, like I say, every assignment would require an inquiry about whether the assignor needs to make commitments about discovery, whether statements by the assignor are attributable to the assignee, and you just don't see that kind of analysis in any of these cases because that's fundamentally not what Rule 25 is about.

THE COURT: Question time?

MR. HO: Absolutely.

THE COURT: So I think you've done a very good job, Mr. Ho, in laying out the public policy in favor of free assignment of federal antitrust claims, but there is another policy that I think is in tension here, and this is the way I'm looking at the case, is you've got, on the one hand, a federal antitrust claim that, for reasons of public policy, as you say, laid out in *Illinois Brick*, should be freely assignable in opposition to a public policy that litigation funders should not control litigation but rather should provide investment funds and hope that they've chosen wisely and that they will recoup their investment plus a

profit.

I understand everything you're saying about Carina no longer being a litigation funder but being a party, but I can't close my eyes to the fact that this is a special investment vehicle set up by Burford Capital, which has taken possession of this lawsuit -- these lawsuits, and that their interest in these lawsuits appears to be their only asset.

In deciding which of the two counterpoised public policies I ought to go with, what's the rule of decision? Which one -- I mean, I know you're going to say that free assignment ought to prevail, but tell me why. And as I say, when I read the briefs, I didn't see much of a free assignability in the defense brief, and I didn't see much about limits on litigation funders' participation in litigation in your brief. So a bit you've talked past each other.

MR. HO: Absolutely, Your Honor, so I'll try to answer that very directly. So I think Point Number One is that when you -- Your Honor is thinking about public policies, they have to be federal policies. And whatever you might try to find in case law from state courts, there is no federal policy along the lines of what Your Honor articulated. There never has been. All of the policies that are articulated by the defendants in their brief are

state law policies. And they are the policies of only certain, in fact, a minority of states.

If Your Honor looks at federal policy, what this Court has said, what the Eighth Circuit has said, if you are looking for federal policy, you look to federal common law, and you look -- sometimes when you are trying to discern federal common law, you look to the Restatement.

So I laid out all the cases that I think already establish that federal common law doesn't recognize this policy, but if -- but I'll also add the Restatement. If you look to the Restatement, the Restatement does acknowledge that at one point, there were policies in our ancient past, in our ancient history about, you know, disfavoring the commercialization of claims, let's say. But those have largely gone away, and the Restatement does not adopt them. In fact, says that those are now disfavored and have more or less vanished.

So Point Number One is: These have to be federal policies, and the policy that the defendants have articulated doesn't get them past the starting gate because they are not federal policies.

Number Two, even if you were to look beyond that, the policies with respect to litigation funding are not -- are kind of a red herring here. You know, the defendants have this kind of like Pavlovian response that every time

there's a litigation funder in the frame, they make all these arguments about control and how a third party shouldn't have control of another party's litigation, but that's not at all what's happening here. Carina isn't seeking to be a litigation funder that controls someone else's litigation.

THE COURT: Well, but the other thing that I have on my mind is the history of this particular -- you know, this case, this motion didn't come, you know, on a clean -- on a clean sheet of paper, and many of the things that are said about control were not said by the defendants, they were said by Sysco when it was having an argument with Burford and when it found it necessary to discharge Mr. Gant's firm as a result, which resulted in this litigation being put on hold for a couple of months while Sysco obtained new counsel.

And so this comes from a place where a litigation funder did seek apparently -- and I understand that there are disputed questions of fact there -- but where Burford did seek to control Sysco's ability to settle at least portions of this lawsuit. And to put it just very, very clearly, why should I not allow Sysco to settle the lawsuit? Why should this lawsuit continue in order that Burford and Carina can achieve a greater return on investment than they might already have?

MR. HO: I think a couple points. One, that question is not before this Court on this motion. That was a question that was presented because -- by virtue of the parties' arbitration agreement in the claim prosecution agreement to a panel of arbitrators. Sysco said they should be allowed to settle. The defendants -- I'm sorry -- Burford said that it shouldn't be allowed to settle.

The arbitrators sided, at least on a preliminary injunction, with Burford and said that Sysco should not -- had contractually committed to certain obligations to Burford with respect to settlement that it had not complied with.

Now, how -- what happened --

THE COURT: You know, pardon me for finding that a little bit unsatisfactory when the practical consequence of granting this motion will be continuance of at least portions of a lawsuit that it looks to me that there was a good chance would have settled.

MR. HO: Well, Your Honor, I'm not -- I think that that is beyond the scope of Rule 25. Rule 25 is asking a much narrower question, which is, is Sysco the real party in interest or is Carina the real party in interest. Which of those two parties ought to be able to proceed.

With respect -- to the extent the Court has concerns that Sysco should have been able to settle the

underlying litigation, the parties, again, had a -- an arbitration agreement where they agreed that that issue would be resolved by arbitration. And then after the arbitration, Sysco was entitled to and did seek to have the preliminary injunction ruling vacated under the Federal Arbitration Act. Now it brought that to Judge Durkin in Illinois, not to this Court, so even Sysco didn't present that issue to this Court. We brought that issue to a Court in New York. But then, at that point, the parties resolved their claims.

And so it does not seem to me that the fact that this arose out of a dispute where one party was saying that the prior arrangement between the parties violated state law -- and, again, I want to make very clear, Sysco -- even Sysco never once argued that the old claim prosecution agreement violated federal law. They were arguing that it violated New York law.

And so, again, if, as you say, it is -- if Your Honor accepts that there is a federal policy in favor of free assignability of claims, whatever the policy of New York may be in terms of restricting the power of the litigation funder to control litigation cannot supersede that federal policy. But -- and, so, the fact that the parties had this dispute and have now settled it doesn't taint this assignment with some kind of illegality. It is

just another instance of parties litigating claims, having disputes over claims, and then voluntarily and amicably resolving those claims in a way that is fully consistent with federal law.

THE COURT: So you mention in your papers that there have been other assignments in this case. And I think one of the ones that you mentioned was Amory Investments or Armory Investments. All I can tell you is that this is the first Rule 25 substitution motion that I have heard in either *Pork* or *Cattle*. Can -- what can you tell me? Are there other litigation funders that have taken over litigation for a -- for a plaintiff in this -- in either of these cases?

MR. HO: Other than -- other than Carina and Amory, I don't have the ability to answer that question.

THE COURT: Okay. And what -- tell me about Amory, because the name was in the papers, but what happened there?

MR. HO: Amory is also a subsidiary of Burford that purchased claims in these cases from the bankruptcy estate of the original plaintiff. And so the -- and then as assignee, it is asserting those claims. Mr. Gant is also counsel to Amory as well.

So the same arguments that we were talking about in this hearing would apply to Amory. And Amory has one

additional argument on top of that, which is that federal bankruptcy law makes absolutely clear that it is not just the right, but, in many instances, the obligation of the trustee, in the context of a federal bankruptcy, to sell off the assets of the estate. And so it can't possibly be, again, that state champerty law or some other kind of state law would impede the ability of a federal bankruptcy trustee to do exactly what it did here, which is to say we have these valuable claims in these cases, we need to liquidate them in order to try to give money to the creditors of the estate, and we're going to sell the claims to an assignee who can then pursue them in its own name.

THE COURT: Are you aware of any case similar -- well, let me back up and ask a different question first. Was the Amory assignment litigated the way this one is being litigated?

MR. HO: There -- in this -- in these cases, I'm not aware of any motion practice with respect to Amory. I will say that in the *Turkey Antitrust* case, which is down in Chicago, there has been a motion for summary judgment filed against Amory on the ground that Amory has no valid rights because the assignment is invalid.

THE COURT: All right. And is there, in your view, any way to -- if I disappoint you and rule for the defendants, is there any way of doing that without

invalidating the assignment?

MR. HO: Is there a way to deny substitution without invalidating the assignment?

THE COURT: Right. Correct.

MR. HO: I suppose that -- you know, as I understand it, the defendants have raised the possibility of essentially punting the issue of the validity of the assignment down the road. We don't subscribe to that because we think that the validity of the assignment is clear as a matter of federal law and that there are no factual disputes about the validity of the assignment because all of the state law policies that they are talking about are not applicable in the context of an assignment of a federal antitrust claim. So I suppose that is one possibility where, you know, the defendants win for now, but where the assignment is not rendered invalid.

THE COURT: So if, for example, the motion for substitution were to be denied, the effect would be that Sysco would have to remain in the case even though they no longer have any economic interest whatsoever in doing so?

MR. HO: Not only no economic interest, but no authority to actually prosecute these claims by virtue of the Assignment Agreement.

THE COURT: Unless the Assignment Agreement is voided --

MR. HO: Correct.

THE COURT: -- one way or another? All right.

All right. Are you aware of any other -- of any decided case in which a litigation funder has done what Burford is doing here, which is to set up a special purpose vehicle, take possession of assets in the form of litigation claims, and then proceed in the shoes of the original party?

MR. HO: I'm not aware of any case on all fours. The reason for that is that this is not an ordinary situation. Litigation funders typically do not take over claims, but there are some specific -- this is a special context in which there was a dispute between Burford and Sysco and -- over the prior arrangement in which Burford was acting as a litigation funder. And as I said before, as a -- a settlement of that dispute, the parties decided to have an assignment of claim.

I will say, though, that the notion that this is somehow extraordinary I think is -- is -- misses the mark. There are lots of cases in which assignments are done for all kinds of business reasons. You know, I refer you -- Your Honor back to the *Sprint* case. There, you know, there were a bunch of plaintiffs that had federal claims. They didn't want to litigate those claims on their own partly because they were small, partly because they are not in the business of litigation. So they assigned the claims to an

assignee for purposes of the assignee bringing those claims on their behalf. And the Supreme Court said, That's totally fine. The assignee has Article III standing to bring those claims.

And what the -- and I think it's important what the standard was that *Sprint* set out. *Sprint* said -- because the dissenting opinion said, Hey, what about champerty? You know, this looks kind of like an invalid assignment where the assignor is saying that it assigns the claims to the assignee, but all the economics of the claim go back to the assignor.

And what the Supreme Court said about that, in the majority opinion, is, We see no evidence that this was an assignment done in bad faith. This was done for an ordinary business purpose. And I think that's the relevant standard that should be adopted in a case like this. Is there any evidence that this was done in bad faith? No. This was done for an ordinary business purpose, mainly, to resolve a dispute between Burford and Sysco in which Sysco decided rather than continuing to fight with Burford, it would assign its claims to a Burford subsidiary so that that subsidiary could continue to prosecute those claims. Nothing in that fact pattern suggests anything about bad faith, and it certainly doesn't suggest anything that offends the policies of the federal antitrust laws.

THE COURT: I think the last -- coming to the end, Sysco's promise to continue to behave as a party, how is that enforceable?

MR. HO: Enforceable by us?

THE COURT: By either the defendants or by the Court.

MR. HO: So I would say a couple things on that. One, the first party that will -- that has the ability to enforce that is Carina because Carina has contractual rights vis-a-vis Sysco to make sure that Sysco does comply with those obligations.

Number Two, Sysco is representing to the Court -- and it did in its reply brief and I think Ms. Rubenstein is here today to confirm those representations -- that Sysco is willing to continue to be treated as a party. And I think if the Court, you know, feels it necessary to -- you know, to make clear that Sysco remains within its jurisdiction for the ancillary purpose of enforcing those commitments, it can do that without the need to have Sysco be a full-fledged party to the case.

There's no point in having Sysco be a full-fledged party to the case because it has no right to prosecute the claims. The only interest that I have heard as to why Sysco should remain in is with respect to this discovery, and that can be handled within the context of a routine Rule 25(c)

substitution.

THE COURT: Last question: What limits are there on the free assignability of federal antitrust claims, and do any of them play a role in this motion?

MR. HO: I think there are two. The first is that if Congress has said claims should not be freely assignable, then Congress gets to decide. So in the *John Wiley* case, for example, the Second Circuit case that I alluded to, the Second Circuit said, in the specific context of the Copyright Clause, it has long been the tradition that the owner of the underlying intellectual property right cannot slice off the right to sue and assign it to a third party. But that is specific to the copyright framework and also to the patent framework.

And so the Second Circuit said, Congress has, in fact, in Section 501(b) of the Copyright Act, said that copyright claims are not freely assignable. So that's one limitation. But the -- that does not apply here because nothing in the Sherman Act or the Clayton Act express any congressional intent to restrict the assignability of federal antitrust claims. To the contrary, they have long been held to be freely assignable.

Number Two is what I was alluding to before with respect to *Sprint*. The Supreme Court said that there might be a different result if there were evidence that the

assignment was in bad faith. But, importantly, it said, Assignment for ordinary business reasons is not bad faith. And so that exception, I think, is out there. It hasn't been extensively litigated, but because the Supreme Court said ordinary business purposes are not bad faith, I don't think this Court needs to get into the, you know, contours of that potential exception because settling a dispute is not only an ordinary business reason, it is a business reason that the Federal Courts have long said promote the civil justice system because of the policy favoring the enforcement of settlements.

THE COURT: So over and above those two limitations that you have just identified, I could auction off an interest in a federal antitrust claim, I could donate it to a charity, I could make a gift of it? There's just no limit?

MR. HO: Other than those two. And, I mean, some of those examples that Your Honor gave are a little bit unusual, but they are not that --

THE COURT: That's why I chose them.

MR. HO: -- they are not that unusual.

So in Amory, if I recall correctly, there was an auction of federal antitrust claims out of the bankruptcy estate because the bankruptcy estate is not only motivated to but obliged under federal law to try to get the most

money that it can for the benefit of creditors from the assets of the estate, and the assets of the estate include federal claims.

There are routine situations where a federal antitrust plaintiff will assign its claim to a trade association because it doesn't want to have to prosecute the claim, and the trade association prosecutes the claim on its behalf. In *Sprint*, there were assignments of claims to collection entities that were set up for the sole purpose of collecting on these claims.

So the -- it is not uncommon whatsoever for federal antitrust claims to be assigned in this way, and all of that is consistent with the fundamental policy of the federal antitrust laws that we want vigorous enforcement of those laws. We don't want the -- the law to impede the ability to transfer a claim from somebody who is willing, able, and motivated -- who is not -- I'm sorry -- willing or able or motivated to pursue it to somebody who is.

THE COURT: All right. Thanks very much.

MR. HO: Thank you, Your Honor. May I --

THE COURT: Just one moment, Mr. Gant.

(Discussion off the record between the Court and the court reporter)

THE COURT: Mr. Gant, we'll hear from you and then take a short break before hearing from the defense.

MR. GANT: Thank you, Your Honor.

I wanted to start by going back to Amory Investments since you asked about it, and I wanted to clarify one thing Mr. Ho said and then see if you had any other questions about it.

Amory is a plaintiff in both the *Pork* and *Beef* cases, it is as well in *Broilers*, and recently filed a *Turkey* case. The claims that were acquired were from an entity called Maines, which was a distributor --

THE COURT: How do you spell that?

MR. GANT: M-a-i-n-e-s.

THE COURT: Thanks.

MR. GANT: -- that went bankrupt. And *Amory* purchased the assets -- the litigation assets of Maines from the bankruptcy court in a process that was, as the bankruptcy processes are, overseen by the bankruptcy court and ultimately subsumed within a confirmation order.

A couple of points about that. One, Mr. Ho I think just misspoke. Maines was never a plaintiff in any of the litigations. So Maines went bankrupt, Amory purchased the litigation assets, and then Amory subsequently filed its own cases, so just to clarify that point.

Of significance, however, is, as you know, the *Pork Litigation* is long past the end of fact discovery. Amory completed fact discovery. The defendants in the *Pork*

case were well aware of the circumstances of the acquisition of the claims by Amory from Maines and never complained about it, didn't ask to file an early summary judgment motion. As you may recall, Your Honor, one of the defendants here asked to file summary judgment early on an issue. They did not ask to do that about Amory. So they've known about the facts of Amory for some time and haven't said anything. So to the extent that Amory is relevant to your consideration, I wanted to paint a fuller picture with respect to that.

THE COURT: So what you are telling me about Amory, Mr. Gant, is that it was not like the case that we're here on today in it wasn't an active plaintiff that assigned its claims to its litigation funder?

MR. GANT: There's no dispute about that, Your Honor.

THE COURT: Okay.

MR. GANT: It was not a plaintiff in the cases at the time it made the assignment.

THE COURT: All right. Thanks very much .

MR. GANT: A couple of other points. I'll try and get it under the ten minutes, and thank you for hearing me out.

To follow up on some of the discussion between you and Mr. Ho, there's a long line of cases -- and I don't

have -- I know these cases from other matters that I have handled -- that Congress -- that the Supreme Court has repeatedly said that Congress is understood to legislate against the backdrop of federal common law. The federal common law that's outlined in our briefs and Mr. Ho so comprehensively discussed with you this morning is the backdrop against which Congress legislates in the antitrust -- federal antitrust realm, so I think that's another important consideration here, which is that Congress is aware of the long-standing rulings that federal antitrust claims are assignable, and it has left that in place and that's understood, in the framework of federal antitrust law, to be part of the fabric of federal antitrust law.

With respect to the countervailing policies that you identified, Your Honor, of course, there's a third -- there's an established federal policy to encourage settlements. Our brief -- and Mr. Ho referred to this, so I'd respectfully suggest that that's also a consideration here. The amount of work that went into both the arbitration proceeding between Burford and Sysco and then the substantial effort that went into resolution of that should be encouraged with respect, Your Honor. And rejecting the assignment here would undo that and I think send, you know -- have repercussions outside of this case about risking -- undermining the policy of encouraging

settlements.

With respect to the notion that there is a policy that litigation funders shouldn't control litigation, Mr. Ho addressed that. I just want to point out one other element of that, Your Honor, which is that the federal rules committee and Congress are well aware of the existence of litigation funders. And Your Honor may be aware that during a recent round of the civil rules committee, there was consideration about introducing some -- into some of the rules something about litigation funding. And the rules committee decided not to do that. And if there is going to be a rule along the lines that you have suggested, and I'm paraphrasing here, that litigation funders shouldn't control litigation, with respect, Your Honor, that should come from the rules committee or from Congress or both. And it shouldn't be done by the Federal Courts on an *ad hoc* basis.

I'd also like to remind Your Honor, you're well aware of the Rules Enabling Act which says, among the -- 28 U.S.C. 2072, that says that the rules cannot abridge, modify substantive rights. There's a standing requirement under Article III that overlays all the federal rules, and under the Rules Enabling Act, it's not pushed aside. It exists in this case just like any other.

And if Sysco has no right to prosecute its claims, how can it remain a party to the case? Let's pose a quick

thought experiment, which is if we had the complete assignment, as we have here, of claims from Sysco to Carina, and the defendants came in with a different position, and then let's say that Sysco said, We want to stay in the case as a plaintiff, and the defendants came in and said, No, you can't do that. You don't have standing. The defendants would be right and Sysco would be wrong. There is no standing. And if there's no standing under Article III, whatever Rule 25 says, it can't say that you create standing where none exists.

Finally, Your Honor, I just want to, of course, remind the Court, this is a Rule 25 motion. Mr. Ho has described the contours of that. And the Supreme Court has made clear in numerous cases, including *Amchem v. Windsor*, 521 U.S. 591 at 620, that the texts of the federal rules limit judicial inventiveness, and Courts are not free to amend a rule outside the process Congress ordered. With respect, Your Honor, Rule 25 does not present you with the authority to invalidate an Assignment Agreement of federal antitrust claims when it's clear that the federal policy allows them to be freely assignable.

And on your question, for example, about the hypothetical of the auction, Ms. Daley informed me that Burford has actually acquired a claim out of an auction process. If there are going to be limits imposed on the

role of litigation funders in litigation, those should come from Congress or from the rules committee. Thank you, Your Honor.

THE COURT: Let's take a ten-minute break. We'll see you all back here in ten minutes.

(Recess taken at 11:02 a.m.)

* * * * *

(11:10 a.m.)

**IN OPEN COURT**

THE COURT: All right. So just before we start, let's talk a little bit about logistics. Ms. Rubenstein, is Sysco going to want to be heard from?

MS. RUBENSTEIN: Yes, Your Honor, if you're amenable to hearing from me for five minutes or less. I think I can get it done in that amount of time.

THE COURT: Five minutes we can do.

And then on the defense side, will there be one presentation or will there be one for *Pork* and one for *Cattle*? How is that going to work?

MR. COLEMAN: Your Honor, Craig Coleman, I'll be arguing for *Pork*, and we have -- and *Beef* defendants are also planning to separately argue. We have coordinated to try to minimize overlap.

THE COURT: Okay. The only thing I'll say is, I

mean, I think these are important issues. They deserve some time. On the other hand, this isn't the only hearing of the day, and so we really do need to wrap up around 12:15 unless I'm going to keep other lawyers waiting.

So if Ms. Rubenstein takes five, Mr. Coleman, does that leave you and co-counsel enough time?

MR. COLEMAN: We'll make it work, Your Honor.

THE COURT: Okay. Well, I don't want to shortchange you, but if you can make it work without compromising your argument, then that's appreciated. But, you know, we can push things if need be. Okay.

MR. COLEMAN: We should be fine. We'll see how things go.

THE COURT: Okay. All right. Ms. Rubenstein, you have the floor.

MS. RUBENSTEIN: Thank you very much, Your Honor. Julie Rubenstein from Baker Botts on behalf of current direct action plaintiff Sysco. I promise I will keep it short, Your Honor, because I think Mr. Ho did really cover the waterfront, and I'm not here to repeat those points.

But from Sysco's perspective, the primary flaw in defendants' argument, at least as they made in their briefing, and I expect that they are going to get up here today and repeat some of this faulty rhetoric, is that they focus on facts that no longer exist.

It is true that Sysco used to own and control the claims in these cases and that Burford was its litigation funder. And it is true, indeed, Your Honor, that Sysco and Burford ended up in litigation -- in arbitration and subsequent litigation regarding a dispute about the ability to control and settle certain of those claims. However, those facts have now fundamentally changed. Those circumstances do not exist anymore. Sysco does not own these claims anymore. Sysco does not control these claims anymore. In fact, Sysco assigned all of its right, title, and interest in these claims to Carina, and now it is Carina that has the exclusive right to litigate these claims, to settle these claims, and to the counsel of its choice. None of the arguments that defendants make about Sysco apply to the circumstances that are now before Your Honor. They all have to do with the old situation.

And, by the way, Sysco's consistent position throughout all of this was and continues to be that only the entity that owns the claims has a right to control litigation and settlement. And Carina is now the party that owns the claims and has the right of control here. It's our position that Sysco does not have standing in these claims -- in this case anymore, and were Your Honor to keep Sysco in the case as some sort of nominal plaintiff, that would prejudice Sysco greatly because we no longer have

standing to litigate the cases.

On the contrary, substitution here would not prejudice defendants, and I want to give Your Honor a little flesh on the bones of what Sysco has agreed to continue to do. Now Your Honor asked a question earlier of Mr. Ho, Well, how does the Court enforce Sysco's promises to continue to remain involved for the purposes of discovery? And if Your Honor is not satisfied with the statements we've put in our briefs, Sysco is more than happy to enter into a stipulation that then gets ordered by the Court as far as its obligations going forward. Sysco has agreed it will continue to respond to discovery as if it were a party.

A very good example is that the *Beef* defendants on Friday of last week served all direct action plaintiffs with Rule 33 interrogatories, Your Honor. Even if Your Honor were to grant substitution today and thereby Sysco would no longer be a plaintiff in the case, Sysco would still agree to answer those Rule 33 interrogatories. It isn't technically obligated to do it as a non-party, but Sysco would agree to continue to act as a party with respect to that type of discovery.

And as I said, Your Honor, we'd be happy to enter into a stipulation. We'd be happy to have Your Honor order us to, you know, comply with those obligations, and Sysco is willing to be subject to the continuing jurisdiction of the

Court for those purposes.

I think -- you know, as Mr. Ho and Mr. Gant said, I think this is a very straightforward application of Rule 25. I think Carina and Sysco have met all of the procedural requirements, and defendants have not pointed to any case and we're not aware of any providing that assignments to litigation funders should somehow be treated differently from any other freely assignable antitrust case. And I think Your Honor would actually be making new law if you were to order that here today.

With that, I'm happy to answer any other questions. I'm also happy to sit down and let you move along with defendants.

THE COURT: I have no questions.

MS. RUBENSTEIN: Okay. Thank you, Your Honor.

THE COURT: Thank you. Thank you.

Mr. Coleman, you have the floor. And I take it you want me to switch to your slide deck?

MR. COLEMAN: That would be the *Beef* defendants.

THE COURT: Oh, okay. Then I'll set that aside for now.

MR. COLEMAN: I'm arguing again on behalf of the *Pork* defendants -- all *Pork* defendants. I do not have a PowerPoint presentation.

THE COURT: That's all right.

MR. COLEMAN: In lieu of a PowerPoint presentation, I would like to start with the original Star Wars movie, Episode 4, the best one. And early in the movie, Your Honor may recall the scene where we've just met Obi-Wan Kenobi. He's in a sand speeder with Luke Skywalker, R2-D2, C-3PO, and they're trying to get off of Luke's home planet. Storm troopers approach. They are looking for R2-D2 and C-3PO, and they start to interrogate Obi-Wan about the droids. Obi-Wan waves his hand, tells the storm troopers, these are not the droids you're looking for. Move along, move along. Go about your business. That's this motion, or at least it's an attempt at a Jedi mind trick.

All that stuff about integrity of the judicial system, the unconscionability of a litigation funder controlling litigation claims, this motion is an attempt by Sysco to wave its hand, try to make that all go away, tell the Court to move along, move along, go about your business.

But there are a lot of problems with the motion. We can start with the fact that with all due respect, counsel for Sysco and Carina are not Jedi knights, we are not storm troopers, and so we remember Sysco barging into court with its house of fire, having terminated its counsel for conspiring with Burford to derail settlements. It was mired in litigation with its funder, and it asked the Court to halt the litigation. Now just a couple months later, we

have the proposed solution of Sysco just walking away while the litigation funder is replacing it as a plaintiff.

So no amount of distraction and deflections related to choice of law, federal common law, and Carina's other smoke screens can negate the conclusion that no Court, no Court will tolerate a litigation funder taking full control of a real plaintiff's claims and trying to turn itself into a party to the litigation.

THE COURT: Has any Court actually said no in these -- in this situation? Is there a reported case?

MR. COLEMAN: No, Your Honor. There are -- I want to go through the cases in which --

THE COURT: Sure.

MR. COLEMAN: -- federal antitrust cases, including this Court, the District of Minnesota, in an antitrust case looking to state law limits on champerty. So we'll work through the choice of law question, and Federal Courts clearly have looked to and invoked state champerty law as a limit on assignability. But in terms of invalidating assignments under state champerty law, that hasn't been reached.

What I would point Your Honor to, and we can get there with a little bit more detail, but ultimately the -- we know where the law of the states come out. In the federal context, defendants cite the *In Re Prescription*

*Opiate Litigation* in which the Court demanded full disclosure of funding agreements. And it did so with the express intent to be able to scrutinize those funding agreements to determine whether litigation funders were controlling litigation decisions. And, in fact, Burford has cited that. You can go on its website. The Court can go on its website today and see Burford hailing that decision as litigation disclosure -- or funding disclosure done right.

And as Burford noted, the Court was specifically focused on ensuring whether litigation funders would control a claim. So we know that Federal Courts are concerned with limits on and involvement with litigation funders, specifically with respect to control of litigation claims, and we'll work through that.

So starting with the choice of law and the assignability of claims, Carina tries to make much of the totally unremarkable fact that federal antitrust claims are assignable. Defendants are not arguing otherwise. So Carina wants to turn the proposition that there are some assignments of antitrust claims that are valid into a sweeping rule that the Court must passively accept all assignments, and that is clearly not the law.

So, again, starting with Carina's case law, they cite the case law and discussed again the cases involving assignment of antitrust claims where we've got direct

purchasers assigning claims to indirect purchasers. Those cases are sort of all of a piece, and they have their genesis in the federal rule in *Illinois Brick* that only direct purchasers can pursue -- have standing to pursue antitrust claims.

So I would point your Court to the *Wallach v. Eaton Corp.* case as an example. So in that case where we have an indirect purchaser that wants to pursue litigation, and it can pursue -- an indirect purchaser can pursue litigation for its own reasons. Maybe it feels like it was the real party who suffered the harm -- the alleged harm from an antitrust conspiracy.

So in that scenario, it's fine, the Court rules, for the direct purchaser to assign claims to an indirect purchaser. And, in fact, we have that -- examples of that in this case by Sysco. So apparently Sysco, it has assigned some of its claims. It directly purchases pork from defendants. It assigned some of its claims to its customers, indirect purchasers, and that is one of the things that led to the fallout with Burford. Burford was challenging the assignments that the *Wallach* case permits. But those type of assignments make good sense.

Under *Illinois Brick*, the Federal Courts are concerned with when you've got a complicated stream of commerce, the Court wants one plaintiff pursuing antitrust

harm. And if assignments from one purchaser -- a direct purchaser to indirect purchaser consolidate antitrust injury in one plaintiff, that's consistent with *Illinois Brick*.

But the key point from the stream of cases is that the assignments always involve a party with an underlying interest in the litigation. They did not involve a litigation funder that has no interest in the litigation but for the funding agreement.

THE COURT: Does that matter, though? If there are no reported cases either for or against, I'd like to go back to the question I posed to Mr. Ho, what are the limits on free assignability of federal antitrust claims that are implicated in this case? And, you know, I take your point, but at the same time, it's a point that's made there is no case saying this can be done. There is no case saying this can't be done. And so how -- what's the rule of decision here?

MR. COLEMAN: So first defendants would point Your Honor to *Martin v. Morgan Drive Away, Inc.* And the citation for that is 665 F.2d 598. It's a Fifth Circuit case in 1982. And, Your Honor, defendants are in the position, given the way the briefing has gone down, that we're talking about a few cases that we haven't cited, so I'll read it into the record. I also have a piece of paper I could provide to the Court with cases that were new cases

that we're talking about at oral argument.

But in *Morgan v.* -- I'm sorry -- *Martin v. Morgan Drive Away*, the Fifth Circuit specifically applied -- it's an antitrust case. And the Fifth Circuit specifically looked to state law champerty to determine whether there was a problem with the validity of the assignment. Applying -- the assignment was from the corporation to shareholders. The corporation didn't find -- I'm sorry -- the Court in *Martin*, the Fifth Circuit, did not find a problem with the assignment given that there was an interested party on the receiving end of the assignment.

Carina, in its brief, tries to dismiss the *Martin* case as outdated or not followed by other Courts, but defendants would refer the Court to *Fischer Brothers Aviation, Inc. v. Northwest Airlines,* 117 F.R.D. 144. It's a District of Minnesota case in 1987 by Judge Symchych. And that case involved antitrust claims brought by a small aviation company against Northwest Airlines. And when the company was sold in the middle of the litigation, the antitrust claims were assigned to the shareholders. So, again, much like the *Martin* case.

And Judge Symchych followed *Martin*, invoked *Martin*. Said that if we have a challenge to an assignment under champerty, we look to state law. And Judge Symchych didn't find a problem because, again, the shareholders were

heavily invested in the litigation. They were ultimately on the receiving end of the financial harm if it had occurred.

Specifically, this Court, however, Judge Symchych, found that the assignment was not, quote, an investment gambit by a disinterested party attempting to use this action to collect a windfall. That's at page 147 of the decision. So that is this Court, in the form of Judge Symchych, specifically casting a serious doubt on the type of arrangement that we have here where we have a disinterested litigation funder, that is, a funder that has no interest in the litigation but for its investment, coming in to the Court and trying to assert control and take an assignment that would be champertous.

But that's two cases, the Fifth Circuit and then this Court following the Fifth Circuit, looking to state champerty law to determine whether an assignment is valid where a champerty concern arises.

Also would refer Your Honor to Federal Courts that look to state champerty law for other nonantitrust federal claims. An example of that is the *Riffin v. Consolidated Rail Corp.* case, 783 Fed. Appx. 246. This is a Third Circuit case in 2019. And there the Court -- this is not an antitrust case, but the Third Circuit looked to state law of federal claims and invalidated them under Pennsylvania champerty law because the assignee was not an interested

party, didn't have any interest in the case but for the investment.

So Federal Courts do look to state champerty law when it's appropriate when that issue arises. And Carina's suggestion to the Court that Federal Courts can't consider a state law on champerty, it's extreme. No Court has said that, and it's clear that states and state law do have an obvious role to play in determining the validity of an assignment like this one, the outer bounds of an assignment, including champerty.

So Carina and Sysco are themselves creatures of state law. They exist as a result of state law. The contract at issue here, the assignment, invokes state law. It's a vehicle of state law. So the idea that the state law just has nothing to say about whether the contract, which is a state law vehicle, is valid and violates public policy, is unwarranted and extreme.

But ultimately, Your Honor, we really don't need to go too far and get too lost in the choice of law thicket, because when it comes to assessing the validity of Carina's assignment, all roads lead to the conclusion that no Court would or has permitted this type of arrangement. That's true under state law. I think that is ultimately true under federal law.

Regarding state law, we would -- I think it's

helpful to start with the Minnesota case *Mazlowski v. Prospect Funding Partners*. And that case is discussed in our brief. The decision by the --

THE COURT: Isn't it, though -- I mean, isn't it federal common law that is the appropriate choice of law answer in this case since this is a federal question case brought under the Sherman Act and the Clayton Act? I mean, I understand that in a diversity case I would apply the choice of law rules of Minnesota because it's the forum state and it would generate the answer it generates. But in a federal question case?

MR. COLEMAN: Well, two things: Again, I mean, the *Fischer Brothers* case is this Court applying state law on this specific question. So when it comes to evaluating whether an assignment is valid, we think it's clear that in federal antitrust cases, state law and state concerns about champerty apply.

THE COURT: So what I hear you saying, and correct me if I'm wrong, is that although federal -- well, let me back up -- is that I should be informed by state champerty law, but I don't hear you saying that this is the applicable law following a choice of law analysis.

MR. COLEMAN: Well, both, Your Honor. As a first step, defendants believe that you should and Courts do follow state champerty law. And we do work through in our

briefing and point the Court to which exactly state laws we think it applies. Delaware, both entities are Delaware entities; Illinois, which the contract invokes Illinois law, so we think Illinois law should apply; or Minnesota where the litigations are based.

So we provide three avenues. I think we can probably take those in order. But, again, defendants' point is it doesn't matter. Even in the *Mazlowski* case -- it's a Minnesota case -- it adopts what Carina describes as the modern permissive approach to litigation funding, and that draws a distinction between traditional litigation funding, where a funder comes in, invests in the litigation, gets the ability to get a return from a damages claim, that's traditional litigation funding, and *Mazlowski* says, That's fine, Minnesota permits that. But, on the other hand, the Minnesota Supreme Court draws a hard line between that and the concept of a litigation funder controlling a litigation on the other hand.

So every jurisdiction -- and we don't need to go get too concerned about this parade of horribles about 50 jurisdictions potentially applying because it just doesn't matter. In every state, the concept of a litigation funder turning itself into a party and assuming control of the litigation is a bridge too far.

THE COURT: So let me -- again, I'm sorry to

belabor this, but you don't seem willing to back away from the assertion that the law of one of three candidate states -- Delaware, Illinois, Minnesota -- is the appropriate choice of law result in this case. That's fine.

But let's say that I disagree and I conclude that federal common law is the appropriate choice of law result. Are you telling me that even if I do that, federal common law says look to state law in order to decide whether an assignment is valid? I mean, because that seems to me to be rather a leap.

MR. COLEMAN: So let's -- so we'll put aside state law. You're acting as a federal common law judge at this point, and then let's go through the lay of the land.

THE COURT: Yes, that would be good. Thank you.

MR. COLEMAN: Right. Thank you, Your Honor. But you are right, I don't think we should walk away from the concept that state law ultimately applies because that's exactly what this Court has held. But we're here. We're acting at federal common law, to what do we look?

Carina tries to invoke the *Sprint* case and turn it into a case on champerty and suggest that *Sprint* may indicate some sort of permissive view towards champerty. That is not the case at all. The *Sprint* case involved an assignment to aggregators. So these are pay phones. Your Honor may recall the pleasure of standing at a pay

phone, pulling a card out of your wallet, and punching in numbers for a long distance carrier. In those scenarios, the long distance carriers have to pay money back to the pay phone operator for the pay phones. If they didn't get the money, those are hard claims to pursue. They set up these entities called aggregators that would handle the claims, take an assignment of the claims.

If damages were paid, the damages went back to the pay phone companies, which is an important point here. Supreme Court looked at this arrangement only as a question of standing. So in a scenario where you have an aggregator that is going to litigate a claim but then remit damages back to the pay phones, do they have standing? The Supreme Court said, That's fine, we're not worried about it.

And, in fact, what's notable about the *Sprint* case is that the dissent raised champerty as an issue and the majority just didn't go there. It specifically declined not to address champerty or go down that road, and it didn't have a need to. So *Sprint* doesn't give you an answer. It doesn't even inform the question.

I've talked about the *Opiate Litigation* case. So it's clear that Federal Courts are concerned about the concept of a litigation funder taking control of a litigation claim. Burford knows it.

And so then we've got to go down the road of

there's not a lot there. We don't have a Federal Court saying federal common law applies because they have always looked to state court on the champerty question. So we don't have, you know, a clear rule from a Federal Court saying in federal common law, federal common law does not permit champerty.

So how should you proceed? The Restatement is not the guide for it, you don't have prior orders, so we're right back to state law, and state law does inform federal common law.

I would refer the Court to a couple of cases. *A.W.G. Farms, Inc. v. Federal Crop Insurance Corporation*, 757 F.2d 720. That's an Eighth Circuit case in 1985. And it makes it clear that state law is one thing that federal common law will invoke, particularly where you don't have clear guidance on a particular issue.

Same thing from *LNV Corporation v. Outsource Services Management*, 2015 WL 4898568. I'd refer the Court to page 11. That's a District of Minnesota case in 2015.

So the idea that we, in federal law, the judge will just put on blinders and ignore state law, that's wrong. So, again, if you are in a world where you don't have clear, definitive guidance at federal common law, state law is the natural place to look, particularly in a scenario where you have got all 50 states aligned on a proposition,

which is what they are doing here, is wrong.

Moreover, we would -- if Your Honor is acting as common law judge, you don't have a clear, definitive rule to apply. Look at the parties, look at the facts before the Court. And, again, defendants think that that leads to a clear answer here. We are not asking the Court to announce a general rule applicable to all cases. We're asking about a particular -- the Court to deny a particular motion involving a particular assignment.

And what's happened here is the worst-case scenario. This is everything that the Courts seek to avoid. Sysco wanted to settle its claims. Counsel for Carina acknowledged that the Federal Courts have a policy supporting settlement of claims. It wanted to settle. It wanted out.

And, by the way, this notion that the defendants were somehow leaning or exercising undue influence or any kind of influence on Sysco, that is nowhere in the record. Those are made-up facts. There's nothing supporting that. And, in fact, the Court should be highly skeptical of the notion that Sysco, a company with a market capitalization in excess of $30 billion, is somehow helpless at the hands of defendants. It's a little preposterous. So we have a litigation funder trying to bump Sysco out of the way so it can continue litigation that Sysco wants to pursue.

The *Turkey Litigation* also should be instructive to a Court sitting in federal common law. Burford was trying to pressure Sysco to bring litigation in the *Turkey* case. Apparently Sysco made the intentional decision --

THE COURT: Okay. Where's that in the record, I mean, what's good for the goose, et cetera?

MR. COLEMAN: That's in our briefing, Your Honor. I -- I can find the specific page number on it. But it's -- in that defendants go through the Burford-Sysco dispute. And in the back and forth between Sysco and Burford, Burford specifically accuses Sysco of breaching the funding agreement by not bringing a lawsuit against -- in the *Turkey Litigation* against the turkey defendants. And --

THE COURT: So if I look in the briefing, I'll find a cross-reference to a declaration which will have an exhibit which are e-mails or something like that?

MR. COLEMAN: Yes, Your Honor. Yeah. And so, you know, surprise, surprise, Carina is spawned on June 12, 2023, takes an assignment of the claims, and just last month filed its own lawsuit in the *Turkey Litigation*, although not actually in the *Turkey Litigation* in Illinois where it's pending but in the Southern District of Texas. So, again, this is an example of a litigation funder blocking settlements, propagating litigation that the real party in interest, the party who, if any antitrust injury was

experienced or existed, it would have been Sysco that was on the receiving end of it, and the funder here is propagating litigation.

I would also refer the Court to what happened in Amory. And we don't need to prelitigate this. Carina is correct that we have not brought a summary judgment motion. We did take discovery of Amory. We took a 30(b)(6) deposition of Amory. The witness -- the 30(b)(6) witness testifying about Maines Paper's claims, it was a Burford executive. And the Court can imagine how that went and unfolded. But defendants are mindful of Judge Tunheim's direction that summary judgment motions should be brought on the summary judgment deadline, and we'll deal with that. But the way discovery unfolded again highlights the problems of a litigation funder attempting to turn itself into a party in the litigation.

I would also say on the common law question about is this okay, is the assignment before the Court, the facts before the Court, is it okay. And what I would say is I have counseled clients on whether to bring opt-out claims or direct action claims, and an important question in that kind of scenario is do your business people feel like they were harmed? Do they care? Was there a wrong here? Do they feel like there's some injustice in the marketplace? Are they willing to stand up in court and point to something

that's -- that was a problem that they -- that they felt like a victim? Those are important questions.

And, Your Honor, we've all been in settlement conferences where the Court or a mediator, settlement neutral, wants the party with settlement authority before them, and often the way that goes is do you really want to go through with trial? Is it worth the burden on the business to try this claim? And settlement neutral will often have to explain just how burdensome litigation is to a business. It's a distraction. That matters. There's an accountability in having a party who is actually a participant in the marketplace present in court as an accountable plaintiff.

The flip side, again, if we're acting in common law, and the Court has got to decide is this okay, the flip side of not invalidating the assignment is what happens if the Court permits it? And in that scenario, anything goes. It's open season for Burford and any other litigation funder to acquire claims by hook or by crook, bankruptcy, wherever they can find a claim, and set up an LLC and litigate the claims and attempt to cash out through the court.

So, unfortunately, Sysco and Carina have put this Court in the position of being a gatekeeper and having to bar the gates. This arrangement has never been approved, so I understand and sympathize with the Court kind of

struggling for what law do I apply, where do I look, where's the clear rule. What we can say is no Court has ever looked at this and said it's okay.

THE COURT: And no Court has ever looked at this and said it's not okay?

MR. COLEMAN: I disagree with that, Your Honor.

THE COURT: No Federal Court.

MR. COLEMAN: I would refer Your Honor to the *Prescription* --

THE COURT: The opiate --

MR. COLEMAN: -- *opioid* case. I would also -- that *Riffin* case is also a good example. Again, not an antitrust case, but we've got federal claims, they are assigned to parties, look to state law and say, no, that's not okay for a funder to violate state champerty law and proceed as a plaintiff.

THE COURT: All right. I don't -- as I promised, I'm not going to cut you short, but if we're going to stick to a 12:15 termination, I think it's time for the *Beef* folks to step up.

MR. COLEMAN: Agreed, Your Honor.

THE COURT: Are you done?

MR. COLEMAN: This is the perfect time.

THE COURT: Okay.

MR. COLEMAN: Our allocation of argument was they

are going to address -- and he may kind of go through some additional things here --

THE COURT: That's fine.

MR. COLEMAN: -- but they are planning to address the Rule 25 considerations.

THE COURT: Thank you.

MR. COLEMAN: Thank you, Your Honor.

MR. STOJILKOVIC: Good afternoon, Your Honor. Let me see if I can get this to work.

THE COURT: Do you want to just identify yourself for the record before you start your remarks?

MR. STOJILKOVIC: My name is Kosta Stojilkovic. I represent Cargill, and I'll be speaking on behalf of all of the *Cattle* and *Beef* defendants. And, Your Honor, I do have a presentation.

THE COURT: Sure.

MR. STOJILKOVIC: I'll put it up there, but I'll also try, going through it, to speak to some of the questions that you have posed already.

We have three core points. Number One, substitution is discretionary and should be denied when it threatens the parties' substantive rights.

Number Two, here it could and, in fact, we believe would adversely threaten the defendants' substantive rights.

And, Number Three, better options exist under the

rule.

And I do want to begin with the rule, and, Your Honor, this is a permissive rule. The default under the rule is if you transfer an interest after a lawsuit is filed -- that's why we're in Rule 25, not 17 -- the action may be continued by or against the original party. And that's even if the assignment is valid. There is not -- you know, I was surprised to hear colleagues on the other side say that there's only one real choice here. The rule gives you the choice to manage the docket in the way that you view best. The default is continue against Sysco even if there's been an assignment. The rule also allows the Court, but does not command it, to substitute or to join.

And, Your Honor, with respect to comments about the federal rules committee, there's nothing about this rule that requires clarification that you have discretion. And the cases on this point, I believe, are uniform. I don't believe we have disagreement among the parties. I'm on Slide Number 3. The *Froning's* case in the Eighth Circuit is clear that you may refuse this even when one of the parties so moves. So this is not some ministerial request. It's left to your discretion, and it's reviewed for abuse of discretion.

And what should guide you in exercising that discretion? As the *Jalin Realty* case that's been mentioned

says, substitution is not supposed to affect the substantive rights of the parties involved. *Great Western Casualty Company*, that one is not from this Court, it's the Southern District of Iowa, but it says the same thing. Take care not to impair the substantive rights of the parties. And, Your Honor, the defendants believe that our substantive rights are very much at risk here.

I'll turn in a moment to add a few comments to the discussion of federal and state law and how to analyze whether this is an enforceable assignment, but I want to also note for the Court -- and I think this is a portion of our brief that wasn't really responded to in reply -- that we have concerns that go beyond that question. Because we are concerned that here what Carina wants is all the benefit of substitution now without a commitment to truly step into the shoes of Sysco for purposes of potential downside. And the reason I say that is that Carina wants substitution granted now by this Court without any of the pending discovery that could further probe their arrangement with Sysco and grant it for all purposes, including remand from the MDL if the case advances that far.

But when we had the meet and confer after the Court directed it and we asked Mr. Gant, Well, will you stipulate to lack of prejudice to defendants if we are dealing with Carina rather than Sysco such as that evidence

from Sysco would be treated as from a party-opponent, that whatever ability we have to contest liability and damages is unchanged if you replace Sysco, that Carina will be responsible for any costs or fees that might be incurred, the response we got was no, and not only no, but that those are issues in the future, that they may well not even be properly before this Court because some may go beyond the MDL posture. And we don't think --

THE COURT: Well, but they are issues for the future. I mean, for example, let's say that substitution is denied. Sysco stays in the case. You have a statement, you want to introduce it under the exception to the hearsay rule for admissions of a party-opponent. Sysco could very well say that was not made by a current employee, that was not in the course and furtherance of their employment. There are all sorts of things that Sysco could say, so --

MR. STOJILKOVIC: Oh, absolutely.

THE COURT: -- I mean, if you want everything that emanates from Sysco to be treated as an admission of a party-opponent under Rule 803, you wouldn't get that with Sysco staying in the case.

MR. STOJILKOVIC: I completely agree with your statement, Judge. But our concern went to a different issue. We understand -- and this is -- I mean, in our case, we're a year away from discovery being over, let alone any,

you know, downstream proceedings past that. We were not asking Carina to stipulate to some particular thing. We haven't even deposed Sysco in our case. Who knows what they will say and how it will play out. What we wanted was agreement on the principle that substituting Carina in for Sysco won't affect that analysis in all of these issues, and that's what they were unwilling to stipulate and unwilling to stipulate to anything other than that we could go get discovery from Sysco.

THE COURT: What is it about this particular assignment that makes this a concern? I mean, in any assignment, these issues are going to come up, and I am not familiar with, you know, sort of supervising assignments to see what the effect is on the litigation posture of the case; if Sysco had merged, if Sysco had been bought, if this was a case against an individual, the individual died and the estate substituted in. In other words, why am I being asked to make an assessment of litigation burden in this one and not in others?

MR. STOJILKOVIC: Your Honor, this is the first Rule 25(c) motion that we have had. This is the first time we've had a chance to address this kind of issue in this case. And the reason -- I'm not asking Your Honor to jump ahead and try to predict what might happen in a year or two years' time. What I am raising question of is we had Sysco

say, We're willing to act as a party in discovery. We have not had any concomitant commitment from Carina that they won't in some fashion look to turn this to their advantage down the road, and that concerns us.

And the cases say, Your Honor, when we look to -- I mean, the cases talk about will it affect substantive rights, and oftentimes that is a forward-looking question. If there's some reason for concern, that is something the Court can consider in exercising its discretion.

But I also want to turn to the question that's predominated today. And I think Your Honor -- I agree with Your Honor when you said that it looks like we're kind of talking past each other, the two sides. And I submit on the core question of what law you look at, we're posing different questions. And if you decide which question is right, that will lead you to the correct analysis.

What the movants have briefed and argued is whether a federal antitrust claim is assignable. What we have briefed and argued is whether a party may assign that claim to its litigation funder. And the reason these two questions are different is because in none of the cases cited by the movants is there consideration of whether there's a champerty concern and how to analyze champerty in the context of a federal antitrust claim assignment. And in the cases we look to, now there are not that many of them,

to be sure, but in all the cases where we have both a federal antitrust assignment and a concern about champerty, the Courts have actually looked to state law.

And Mr. Coleman talked about *Martin*. I just want to put the quote up because it's the same point I just made. What the Fifth Circuit says is, of course, federal antitrust claims are assignable as a matter of federal law. Our concern here, however, is not with the substance of the assignable claim. It's not about direct, indirect, federal law and how it treats the prosecution of Sherman Act claims, but the form in which they may be assigned. And there, where a champerty concern was raised, the Fifth Circuit said, we look to state law instead of creating a federal common law of champerty out of whole cloth.

And the reason that we think that's important is in some ways, the way the movants have postured this, they say, Don't look to state law because we're governed by federal common law, but then none of the federal common law cases dealt with champerty, and so they combined those two to say there's no prohibition on champerty in federal antitrust assignments. Respectfully, I don't think that's a good way to proceed because no Court has said federal antitrust is a champerty-free zone, which is essentially their position. And the *Martin* approach makes sense.

Now, Your Honor, on the question of whether you

want to proceed under state law or federal law, I mean, I would go back -- the first thing I thought about when I read the reply briefs was Justice Brandeis in *Erie* saying there's no such thing as general federal common law. You know, we cross the street from state court to federal court. We don't just all of a sudden just come up with entirely new principles.

All Courts that have looked at champerty have said, control is the issue, and a funder that -- or any other party who has no factual nexus to the claims. This is not -- and it's not a bankruptcy assignment or something like that where you are trying to find a way for a claim to survive that otherwise couldn't. If somebody has no factual nexus to the claims and is just in there to speculate, that's the core of the issue.

And that's why we think the history here is relevant, Your Honor. I mean, in that respect, I think in some ways we agree, because the movants say, Well, you have to keep in mind this assignment is part of a broader settlement. You have to keep in mind, Your Honor, to what that broader settlement dealt with. If I had to ask the kind of law school exam version of what this argument is, it's the following: If you have a funder improperly exercising control in a champertous fashion over a party's claim, can the objection to that be obviated by assigning

the claim? *Martin* says when you have champerty and federal antitrust, you look to state law. And it's relevant that *Fischer Brothers* in this district looked to that and so look to Ohio law. That -- again, you don't see it in the quote here, but that is a champerty decision.

And now in that case, the finding was no champerty, but that was on the facts because they were found to be -- it was not to somebody who was just speculating and who had no factual tie to the issues in the litigation. Here we have different facts.

And, Your Honor, I threw this one in, and I'll pass it up. The third case -- we've looked everywhere. These were the only three cases we found that present both parts of this; federal antitrust claim, champerty objection to an assignment. This third one is from the Second Circuit in 1918. I guess the Sherman Act was still pretty fresh in the mind. You can't see from here that it's champerty, but if you look up the cite, it is a champerty case, and they look to state law.

And by contrast, the movants' out-of-circuit cases, they don't discuss champerty, neither do their Supreme Court cases except in the dissent in *Sprint*, and the majority says, We're not concerned about champerty because there's no bad faith, and because of that, they also don't analyze the issue.

Under federal law, is it consistent, Your Honor, with the overall purposes of the antitrust statutes when Sysco has a settlement with one of these defendants for somebody to come and blow it up to seek more recovery? No cases -- none of the plaintiffs' cases analyze that, and the facts are different. So are Sysco's other assignments, Mr. Coleman covered this, but they are indirect customers.

The other point I want to make, in our case, we have posed discovery on this. So, Your Honor, if you are in a position, based on this record, to find that this assignment is not enforceable, then I think you have all you need. But if there's any question about that in your mind, I would position that we shouldn't have to litigate this with one hand tied behind our back because what we have is the assignment they chose to make public. We know it's part of a larger set of agreements to settle their dispute. We also know it involves and references underlying contracts that were in place prior to the assignment.

All of the rest of that stuff has not been disclosed. We have sought discovery on it. It may inform -- not only further inform the history of this champertous arrangement, it also may inform, you know, we know from their assignment that Carina has gotten all the benefit and all the control, but, you know, if we have offsets against claim damages, if we have something about Sysco's conduct

that we can raise in our defense, we don't know whether that has traveled to Carina or not.

We are also, no matter what, Your Honor, going to have to deal with two sets of counsel. Because at their instruction, even if this is granted, we're going to go to Sysco for discovery, we're going to go to Carina for substance. We submit, again, it's forward-looking. I don't know how it will play out, but one can easily imagine areas where those two will overlap, and who is going to make the calls and who are we going to deal with?

But the last point I want to make is kind of going back to the beginning and Rule 25(c). This is in the heartland of the Court's discretion. If you are persuaded on the record we have here that the judgment is unenforceable, then I think clearly you should deny substitution. But if there's any -- if you are uncertain about that, the wise course would still be to proceed in another fashion than what plaintiffs are asking.

And what we're asking for -- so if you don't reach the ultimate issue, you could still deny it without prejudice. We can re-raise it once we've gotten our discovery and fully litigate it. If Carina wants to continue to reserve the ability to kind of step out of Sysco's shoes post-MDL, we could kick the can down further.

And the last point I'll make too is we're not the

movants here. We're not making a motion for joinder. We have significant doubts that this is an enforceable assignment, and so we're not inviting Carina into the case. But I was surprised that counsel for Carina is unwilling to explore that. The case law says again when there's uncertainty, if you have to do something. Why are we in a rush to get rid of Sysco?

The rule is discretionary, Your Honor, and given all the weighty concerns here, we submit that the right way to approach that discretion here is to deny the request.

THE COURT: Thank you.

MR. STOJILKOVIC: Thank you.

THE COURT: Mr. Ho, do you want a few minutes to respond just to --

MR. RASHID: Your Honor, can I just get two minutes to say something specific to JBS?

THE COURT: And you are?

MR. RASHID: I'm Sami Rashid, counsel for JBS.

THE COURT: Thank you. Sorry I didn't recognize you. Yes.

MR. RASHID: Two minutes or less. Thank you, Your Honor.

So I'll be -- I'll be brief, Your Honor, but I didn't want to leave here today and leave Your Honor misapprised of an important detail in light of some comments

from Carina's counsel, Sysco's counsel. And I believe Your Honor said something earlier on that if this assignment had not happened, Sysco would have settled some claims in this litigation.

THE COURT: And I don't -- I was careful in what I said because I am not entirely sure what the state of the record is on that point.

MR. RASHID: Okay. Well, I can clarify that for Your Honor, and just to say that JBS, in both the *Pork* and *Beef* cases, maintains that it has settlements with Sysco. To the extent that Sysco or Carina are suggesting otherwise, we are going to take that up with them separately.

Your Honor, I agree with Mr. Ho that you don't need to delve into these underlying issues in great detail in order to resolve the present motion to substitute that is before the Court. I will say though, Your Honor, that to the extent that there is a dispute on this, that it would only serve to underscore the extraordinary and troubling nature of the assignment and substitution that has led to this chain of events before Your Honor.

THE COURT: All right. Thank you for that information.

Mr. Ho, we can have about ten minutes.

MR. HO: I will try to keep it even briefer than that.

THE COURT: You can tell me if these are the droids we're looking for.

MR. HO: I cannot purport to be either a Jedi or a storm trooper, although I feel like we are on the light side of the force on this side.

The thing I really need to take issue with is the characterization of *Fischer*. Your Honor can read *Martin* for yourself. *Martin* is from 1982. It said the only precedent we can see on this point is the *Sampliner* case from, you know, the early -- from 1910s. And it recognized that *Sampliner* was in tension with a long line of cases saying that there needs to be federal uniformity on the question of the standard for release of antitrust claims, but what it said is, we'll follow *Sampliner* and what it said in a footnote is because it doesn't matter. Under Louisiana law, Louisiana being a civil law jurisdiction never even adopted champerty; and so if we apply Louisiana law, there's no champerty. And so the fact that Louisiana had no champerty was a very important aspect of *Martin* because, otherwise, you know, if champerty exists and applies, it's not about the form of the assignment. Champerty, certainly as the defendants are seeking to apply it here, would be a direct obstacle to the assignability of federal claims, and nothing in *Martin*, I think, sanctions that.

But back to *Fischer*, it's been mischaracterized by

my friends on the other side. It did not address the question of whether federal common law should apply because the defendants cited *Martin*, and the slide you saw you will see, if you look back at it, it starts the sentence -- the quotation in mid-sentence and suggests that that's a characterization made by the Court. That was a characterization of the defendants' argument.

Defendants cited *Martin* for the proposition that state law should apply, and what did the plaintiffs say? And this is the key part of *Fischer*. Plaintiff said, not Ohio law, but it didn't say federal law should apply. It said Minnesota law should apply. The direct quote is, Plaintiff has cited only Minnesota law on the subject of assignment validity. So the issue of whether federal common law should apply was never raised in *Fischer*, and so it doesn't stand for the proposition that state law ought to apply.

The second point is the notion that all 50 states have said that you cannot assign a claim to a litigation funder or, more accurately, a party that also provides litigation funding to other clients and that did, in the past, provide litigation funding to this client, there's no fifth -- not all 50 states are in accord on that. There's not a single case from any of the 50 states that says that. And so if you even were to be informed by state law on the

question, the alternative framing of the question, there would be not a single state that would come to the answer the defendants are asking for.

So with that, I'm going to yield to Mr. Gant who has some specific points to raise as well.

MR. GANT: With your permission, Your Honor, about two minutes?

THE COURT: Uh-huh.

MR. GANT: Thank you. Let me begin by something that Mr. Coleman said and Mr. Rashid said when he just got up. If I heard Mr. Coleman correctly, he said Sysco wanted out of the cases. Just so the record is clear, and this is a matter of public record from the filings in federal court related to the arbitration proceedings, with respect to the *Pork* and *Beef* case, there was only one common defendant in *Pork* and *Beef* over which there was a potential settlement by Sysco. And that -- and Mr. Rashid just got up and made a claim that it's JBS's position that Sysco has settled with them. I'll leave that to Sysco and JBS to settle at another time, but that's not what Carina was told was the status of the litigation.

But if Mr. Rashid was right, then if you reject the assignment, Sysco would not be out of the case. JBS was the only party with which there was a *Beef* and *Pork* settlement discussed. So the suggestion by Mr. Coleman that

Sysco wanted out was a dramatic overstatement unsupported by the facts or the record.

Second, the defendants are making a lot of arguments that ask you to assume that Burford acted improperly with respect to its position about Sysco's authority to enter into those potential settlements. I did not represent either party in the arbitration proceedings. But like anyone else can read the public record, it is -- and Mr. Ho discussed this, that the preliminary ruling from the arbitration panel was that Burford was correct and Sysco wasn't. So the suggestion that there was something wrong -- that Burford was doing something wrong and not acting within its rights, at least from the perspective of the arbitration panel, was rejected. The defendants' position did not carry the day.

Third, Your Honor, the defendants clearly have acknowledged what they are asking you to do is to create federal common law that doesn't yet exist. You repeatedly asked questions about their authority, what the cases say. They want you to create federal common law where it doesn't exist, and with respect, Your Honor, that is not the appropriate course of action. You should only find that federal common law dictates an outcome if there's a body of federal common law that supports it that already exists, not to make it up. They are asking you to be a federal

policymaker, and that is not the role of this Court with respect, Your Honor.

Finally, I just want to note I made a point about standing and Article III and that it was above and not subordinate to the federal rules. I made that comment and I note with interest that no defendant has gotten up today and asserted that Sysco has standing after the assignment by it to Carina. It doesn't, Your Honor. And Article III cannot be cast aside.

Unless you have any other questions for me or Mr. Ho, we thank you for your time.

THE COURT: No. Thank you.

Ms. Bloomenstein [sic], I don't know if this will wind up mattering or not, but what would you respond to the comments of Mr. Rashid, if you know?

MS. RUBENSTEIN: Well, Your Honor, what I would say is that, first of all, just to get rid of any confusion, there was never a time in which Sysco was prepared to settle all of its claims.

THE COURT: Right. I've never understood that. I have always understood it was a portion of its claims. That is correct?

MS. RUBENSTEIN: That is correct --

THE COURT: Okay.

MS. RUBENSTEIN: -- only a portion of its claims

here.

THE COURT: What about JBS?

MS. RUBENSTEIN: What is the Court's exact question with regard to JBS?

THE COURT: Well, Mr. Rashid got up and said that JBS's position is that it has settled with Sysco. As I say, I don't know if this is going to wind up mattering or not, but you are going to be gone soon, so before you go, I'd like to hear what you have to say about those comments of Mr. Rashid, if you have anything to say. And if you don't, that's fine.

MS. RUBENSTEIN: I think I would have to confer with my client in order to be able to respond fully to that argument today.

THE COURT: That's fine.

MS. RUBENSTEIN: I'd be happy to do that and get back to the Court if that is something the Court would like an answer on before ruling?

THE COURT: Well, we'll see.

MS. RUBENSTEIN: Okay.

THE COURT: I really don't know at this point.

Thank you all very much. This has been extensively and very well-briefed on both sides. It was very well-argued today. Obviously this is not going to be a rule-from-the-bench situation.

Just as a matter of housekeeping, I have been -- I've got these PowerPoint packets. I am going to take these away. I am going to consider them unless there is an objection by any of the attorneys. Hearing none.

Mr. Coleman also stated that he would be willing to get me a list of cases. I'm happy to receive that, but I want to give the same opportunity to Carina and Sysco. So if there are cases that you think I should read, but I am not looking for any further argument. We are at a point of diminishing returns, but if there are particular cases and you want to send me a cite -- a title and a cite, I'll be happy to take those in.

Is there, Mr. Ho, or Mr. Gant, or Ms. Bloomenfield [sic], anything from your point of view that we need to address today?

MR. HO: No, Your Honor.

MS. RUBENSTEIN: No, Your Honor.

THE COURT: Okay. Mr. Coleman, Mr. Stojilkovic, anything from your point of view?

MR. COLEMAN: No, Your Honor. Would the Court prefer the cases put on the docket or just e-mail chambers?

THE COURT: Let's put them on the docket. I'm in favor of transparency, so let's just file something, yeah.

MR. COLEMAN: That sounds good, and just for the Court's ease of reference, the *Turkey Litigation* is

discussed on pages 8 to 9 of our brief.

THE COURT: Thank you. I appreciate that.

Mr. Stojilkovic?

MR. STOJILKOVIC: Yes, Your Honor. I had added one slide to my presentation that isn't in the hard copy, and if I can just pass that up.

THE COURT: Yeah, any objection to that?

MR. STOJILKOVIC: It's the Second Circuit case, Sampliner.

MR. GANT: No, Your Honor. Is it in the copy you gave us?

MR. STOJILKOVIC: I'm going to give it to you.

MR. GANT: Okay.

THE COURT: All right. Received.

Mr. Stojilkovic, just before you leave, hand that in and we'll -- and I'll incorporate it into what I have got.

MR. GANT: Just one clarification about the cases that Mr. Coleman mentioned, I thought I heard him say --

THE COURT: Can you speak into the microphone? The reason is although I can hear you, it's not getting recorded.

MR. GANT: Apologies, Your Honor.

One clarification about the cases that are proposed to be submitted. When I heard Mr. Coleman, I

thought he was referring -- proposing to identify cases that were mentioned today.

THE COURT: Yes.

MR. GANT: Yes. You are not asking for additional cases.

THE COURT: No. I am asking for additional -- cases that were mentioned today but aren't in the papers, and if you have got cases in that category, I'm happy to receive them. I want to be, you know, even-handed, but I would -- I would like to receive the case list from Mr. Coleman.

MR. GANT: Okay. Thank you, Your Honor.

THE COURT: Okay. All right. Thank you all very much. Safe travels back for those of you who came in from out of town, and this hearing is adjourned. Thank you.

(Court adjourned at 12:15 p.m.)

* * *

I, Erin D. Drost, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter to the best of my ability.

Certified by: *s/ Erin D. Drost*

Erin D. Drost, RMR-CRR